UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

MS. M., as parent and next friend of K.M., a minor,	***)***	
Plaintiff	***)***	
v.	***)***	***Civil No. 02-169-P-H***
PORTLAND SCHOOL COMMITTEE,	***)***	
Defendant	***)***	

MEMORANDUM DECISION ON MOTION TO SUPPLEMENT RECORD

Ms. M., as parent and next friend of K.M., a minor, moves to supplement the administrative record in the instant Individuals with Disabilities Education Act ("IDEA") appeal. Plaintiff's Motion To Permit Presentation of Additional Evidence, etc. ("Motion") (Docket No. 8) at 1. For the reasons that follow, the Motion is denied.

I. Applicable Legal Standards

The IDEA directs that a court reviewing state educational proceedings "receive the records of the administrative proceedings" and "hear additional evidence at the request of a party[.]" 20 U.S.C. § 1415(i)(2)(B)(i) & (ii). Nonetheless, as the First Circuit has clarified, a party has no absolute right to adduce additional evidence upon request:

> . . . As a means of assuring that the administrative process is accorded its due weight and that judicial review does not become a trial *de novo*, thereby rendering the administrative hearing nugatory, a party seeking to introduce additional evidence at the district court level must provide some solid justification for doing so. To determine whether this burden has been satisfied, judicial inquiry begins with the administrative record. A district court should weigh heavily the important concerns of not allowing a

> party to undercut the statutory role of administrative expertise, the unfairness involved in one party's reserving its best evidence for trial, the reason the witness did not testify at the administrative hearing, and the conservation of judicial resources.

Roland M. v. Concord Sch. Comm., 910 F.2d 983, 996 (1st Cir. 1990) (citation and internal punctuation omitted).

II. Analysis

Ms. M. seeks to supplement the record as to two issues: her asserted illiteracy and alleged misrepresentations by K.M.'s father and paternal grandmother concerning the extent of the father's financial contribution to K.M.'s tuition at Aucocisco School. Motion at 8-11. Ms. M. argues that this information "was not available to the hearing officer at the time of the hearing, but clearly is relevant to the decision now facing the Court in this action." *Id*. at 8. The defendant Portland School Committee ("School") rejoins, and I agree, that Ms. M. fails to demonstrate "solid justification" for these additions. *See* Objection to Plaintiff's Motion to Permit Presentation of Additional Evidence ("Objection") (Docket No. 9) at 2-4.

A. Testimony and Documentation Regarding Illiteracy

Regulations implementing the IDEA provide, in relevant part:

> (c) Reimbursement for private school placement. If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private preschool, elementary, or secondary school without the consent of or referral by the public agency, a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made FAPE available to the child in a timely manner prior to that enrollment and that the private placement is appropriate. . . .
>
> (d) Limitation on reimbursement. The cost of reimbursement described in paragraph (c) of this section may be reduced or denied –
>
> (1) If –
>
> (i) At the most recent IEP meeting that the parents attended prior to removal of the child from the public school, the parents did not inform the IEP team that they were

> rejecting the placement proposed by the public agency to provide FAPE to their child, including stating their concerns and their intent to enroll their child in a private school at public expense; or
>
> (ii) At least ten (10) business days . . . prior to the removal of the child from the public school, the parents did not give written notice to the public agency of the information described in paragraph (d)(1)(i) of this section;
>
> ***
>
> (e) Exception. Notwithstanding the notice requirement in paragraph (d)(1) of this section, the cost of reimbursement may not be reduced or denied for failure to provide the notice if –
>
> (1) The parent is illiterate and cannot write in English[.]

34 C.F.R. § 300.403.

Carol B. Lenna, the hearing officer assigned to Ms. M.'s case ("Hearing Officer"), found that Ms. M. (i) began the process to enroll K.M. at Aucocisco School on May 1, 2001, (ii) did not inform K.M.'s pupil evaluation team ("PET") at meetings held May 9 and June 13, 2001 that she rejected its proposed individualized education program ("IEP") or was considering enrolling K.M. in a private school, and (iii) did not inform the School of K.M.'s private placement until September 11, 2001, more than ten business days after K.M. had been removed from public school. Administrative Record ("Record"), Vol. I at 158. The Hearing Officer then considered whether Ms. M. met the illiteracy exception, ruling:

> . . . I do not dispute the parent's claim that she suffers from a significant learning disability similar to her son's, and struggles to read and write. But the evidence does not demonstrate that she is illiterate and cannot write in English. The parent is a high school graduate. There are at least three documents in the record written by the parent in her own handwriting: the September 11, 2001 letter, the application for enrollment at Aucocisco, and a letter to the school written in 1995. Both the application to Aucocisco and the letter to the school in 1995, while containing some grammatical errors, contain well-formed words and language that is clear. Her intent is easily understood. The principal and the student's fourth grade teacher both testified that they were aware that the parent had difficulty reading, but each of them had no indication that she was unable to read. There is no way to conclude that she meets the exception in paragraph (e).

Id. at 158-59.[1]

Ms. M. now states, in an affidavit filed with her Motion, that she "seek[s] to present through testimony, and documentary evidence in the form of Exhibit 1, information concerning my reading and writing ability at the time this dispute with the Portland School Committee arose and I submitted my reimbursement request." Declaration of Ms. M. ("M. Decl.") (Docket No. 7) ¶ 27. As Ms. M. herself acknowledges, she testified at hearing "regarding [her] own severe language-based disability as it affected [her] ability to read and write." *Id*. ¶ 17. Apart from her assertion that she subsequently obtained the testing results appended as Exhibit 1, *see id*. ¶ 20, her proferred testimony adds nothing new, *compare generally id*. with *id*. ¶ 17. The School observes – correctly – that the rule permitting the taking of additional evidence in an IDEA appeal "does not authorize witnesses at trial to repeat or embellish their prior administrative hearing testimony." Objection at 5 (quoting *Town of Burlington v. Department of Educ*., 736 F.2d 773, 790 (1st Cir. 1984), *aff'd*, 471 U.S. 359 (1985)).

Nor does Ms. M. demonstrate "solid justification" for introduction of the documentary evidence – a copy of a reading test administered to her by the Portland Adult Education Department on or about January 11, 2000. *See* M. Decl. ¶ 20 & Exh. 1 thereto. Clearly, this document would have been "available" to the Hearing Officer had Ms. M., who was represented by counsel at hearing in April and May 2002, *see* Record, Vol. IV at 668, 671, produced it. Both Ms. M.'s memorandum of law and her affidavit are conspicuously devoid of any explanation for that omission. *See generally* Motion; M. Decl. Moreover, Ms. M. builds her case for admission of the new documentary evidence on a faulty foundation: that "the hearing officer erred in concluding, purely on the basis of Ms. M.'s graduation from high school, that Ms. M. was not illiterate[.]" Motion at 5, ¶ 19. As the excerpt

[1] In a footnote, the Hearing Officer observed that although Ms. M. claimed that she had only copied the words in the September 11, 2001 letter from a template given her by her advocate, and thus may not have composed it, she clearly wrote it. Record, Vol. I at 159 (continued…)

quoted above makes clear, this is not so. The Hearing Officer also took into consideration (i) the presence of three letters of record in Ms. M.'s handwriting and (ii) testimony of two people that they were aware only that Ms. M. had difficulty reading, not that she could not read at all. The late-proferred test results do not undermine the Hearing Officer's finding that Ms. M. did not meet the two-part illiteracy exception.

B. Testimony Regarding Alleged Misrepresentation

Ms. M. finally seeks to adduce evidence that on or about September 8, 2002 she learned from K.M.'s paternal grandmother that she and K.M.'s father had lied to Ms. M. and to the Hearing Officer concerning the extent of K.M.'s father's contribution to the Aucocisco tuition. Motion at 6, ¶ 23 & 10.

While this is indeed newly discovered evidence, it is (as the School points out) irrelevant to the instant appeal. *See* Objection at 8-10. Ms. M. contends that, although K.M.'s father originally represented that he had paid more than $14,000 in tuition money, K.M.'s paternal grandmother had in fact paid approximately half of that amount. Motion at 6, ¶ 23. She argues that the Hearing Officer (i) considered this relevant, including it in the hearing decision and making some preliminary determination of K.M.'s father's credibility, and (ii) ordered some reimbursement of tutoring paid for by Ms. M. and K.M.'s father but left the recipient unspecified, as a result of which Portland reimbursed K.M.'s father instead of K.M. *Id*. at 10.

The Hearing Officer denied Ms. M.'s request for reimbursement of Aucocisco tuition for the 2001-02 school year in its entirety. Record, Vol. I at 157-59. She did order the school, upon receiving *bona fide* evidence of payments to tutor Ann Nordstrom, to reimburse the full cost of such payments made during the 2000-01 school year (when K.M. remained enrolled in public school). *Id*. at 159-62. However, inasmuch as appears, no misrepresentation was made concerning K.M.'s

n.11.

father's role in paying for the tutor; rather, the alleged misrepresentation concerned his role in payment of the Aucocisco tuition. *See* Motion at 10; Record, Vol. I at 51-52, 142 n.1 & 150, ¶ 24 & n.6.[2]

In any event, Ms. M. currently seeks, *inter alia*, "reimbursement of all expenses she has incurred or will incur to secure K.M. an appropriate education at the Aucocisco School, whether as reimbursement or compensatory education" (Count I) and judgment in her favor including "reimbursement of expenses, compensatory services, and/or compensatory damages in an amount which the Court deems reasonable in the premises" (Count II). Complaint at 11, ¶ 4 & 12 ¶ 1. K.M.'s father is not a party to the instant action. Ms. M. does not proffer any evidence concerning misrepresentation or confusion affecting reimbursement due to her should she prevail in this action. *See generally* M. Decl. Any misrepresentation or dispute concerning amounts potentially due to K.M.'s father versus K.M.'s paternal grandmother is irrelevant.

III. Conclusion

For the foregoing reasons, Ms. M.'s motion to supplement the administrative record is **DENIED**. Inasmuch as the Scheduling Order previously issued in this case did not set forth an initial briefing deadline in the event of denial of a motion to supplement the record, *see* Scheduling Order (Docket No. 6) ¶ 4, paragraph 4 is hereby modified to add the following underlined language: "Within 45 days of the presentation of any additional evidence that the Court may have approved or of the date of denial of a motion to supplement, . . . Plaintiff shall submit her brief to the Court setting forth her legal position and argument . . . ." Ms. M.'s brief accordingly is due within forty-five days from the

[2] To the extent Ms. M. seeks indirectly to attack K.M.'s father's credibility with respect to payments to the tutor (Nordstrom), such an attack is problematic (and therefore does not justify introduction of the proferred evidence) for several reasons: (i) K.M.'s father did not actually testify at hearing, *see* Record, Vol. IV at 669, (ii) the Hearing Officer's order directing reimbursement of monies paid to Nordstrom does not appear to be at issue in the instant appeal, *see generally* Complaint (Injunctive Relief Requested) ("Complaint"), attached to Notice of Removal (Docket No. 1), and (iii) the First Circuit has cautioned that a court "should look with a critical eye on a claim, such as made here, that the credibility of a witness is a central issue. The claim of credibility should not be an 'open sesame' for additional evidence," *Burlington*, 736 F.2d at 791.

date hereof, with all other briefing to follow the schedule set forth in the Scheduling Order.

So ordered.

Dated this 10th day of December, 2002.

_____
David M. Cohen
United States Magistrate Judge

ADMIN

U.S. District Court
District of Maine (Portland)

CIVIL DOCKET FOR CASE #: 02-CV-169

MS. M v. PORTLAND SCHOOL COMM Filed: 08/12/02
Assigned to: JUDGE D. BROCK HORNBY
Demand: $0,000 Nature of Suit: 440
Lead Docket: None Jurisdiction: Federal Question
Dkt # in Cumberland Superior : is 02-cv-329

Cause: 20:1400 Civil Rights of Handicapped Child

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v.	
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